BOARD OF COUNTY COMMISSION
AGENDA ITEM SUMMARY

Meeting Date: 9/20/06 - MAR
Bulk Item: Yes X No ___

Division County Attorney's Office
Staff Contact Person: Suzanne Hutton

AGENDA ITEM WORDING:
Approval to advertise and hold a Public Hearing to be held November 15, 2006 at 3:00 p.m. in Key Largo, Florida to consider the adoption of a Resolution approving the *Proposed Beneficial Use Determination* of Special Master John J. Wolfe In Re: Geneva Sutton Beneficial Use Application, pursuant to Sec. 9.5-174(a), Monroe County Code.

ITEM BACKGROUND:
Geneva Sutton and her husband purchased two (2) lots located in Key Largo, FL in 1971 with the expectation of developing either a small condominium development or one or more single-family residences. The Lots are in the Sparsely Settled (SS) land use district and are vacant. On January 7, 2005, Monroe County receipted an *Application for a Determination of Beneficial Use* filed on behalf of Geneva Sutton and payment of $750 (Check #683). Ms. Sutton alleges she "*..has been denied all reasonable economic use of her property by application of Policies 203.1.1 and 204.2.1 of the Year 2010 Comprehensive Plan (the "Plan") and Sections 9.5-347 and 9.5-348 of the Monroe County Code (the "Code") and is entitled to relief under Policy 101.18.5 of the Plan and Section 9.5-173 of the Code. Section 9.5-347 requires a 100% open space ratio for wetlands and 9.5-348 requires a 50 foot setback from wetlands, which may, in some circumstances, be reduced to 25 feet.*" On July 25, 2005, an evidentiary hearing was held before John J. Wolfe, designated Beneficial Use Special Master for Monroe County. On July 19, 2006, the Special Master issued a *Proposed Beneficial Use Determination* recommending "*..that a final beneficial use determination be entered awarding just compensation to the Applicant to be determined as of 1986 when the Lots became unbuildable by operation of the Plan and Code.*" Sec. 9.5-174(a), Monroe County Code, requires the Board approve or reject the Special Master's determination during a public hearing and that the public be given the opportunity to be heard and mark arguments for or against the determination during the Board's public hearing.

PREVIOUS RELEVANT BOCC ACTION: N/A

CONTRACT/AGREEMENT CHANGES: N/A

STAFF RECOMMENDATIONS: Approval.

TOTAL COST: N/A
COST TO COUNTY: N/A
REVENUE PRODUCING: Yes ___ No X

BUDGETED: Yes ___ No ___
SOURCE OF FUNDS: ___
AMOUNT PER MONTH ___ **Year** ___

APPROVED BY: County Atty ___ OMB/Purchasing ___ Risk Management ___

DIVISION DIRECTOR APPROVAL: Suzanne A. Hutton 8/25/06
SUZANNE A. HUTTON, COUNTY ATTORNEY

DOCUMENTATION: Included X Not Required ___

DISPOSITION: ___ **AGENDA ITEM #** ___

Revised 2/05

LAW OFFICES OF
JOHN J. WOLFE, P.A.

2955 OVERSEAS HIGHWAY
MARATHON, FL 33050
TELEPHONE: (305)743-9858
FACSIMILE: (305)743-7489

July 20, 2006

Julie Thomson
Administrative Assistant
Monroe County Planning Commission
Planning Department
2798 Overseas Highway
Suite 410
Marathon, FL 33050

RE: Beneficial Use Determination – Geneva Sutton

Dear Julie:

Enclosed is the Proposed Beneficial Use Determination for Geneva Sutton.

Very truly yours,

John J. Wolfe
wolfe@marathonlaw.com

JJW:jd

Cc: Andrew Tobin, Esq.
E. Tyson Smith, Esq.

RECEIVED
AUG 07 2006
MONROE COUNTY ATTORNEY

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AUG 07 2006
MONROE COUNTY ATTORNEY

BENEFICIAL USE
MONROE COUNTY SPECIAL MASTER

In Re: Geneva Sutton
Beneficial Use Application

_____/

PROPOSED
BENEFICIAL USE DETERMINATION

The application for a beneficial use determination was considered at a duly noticed hearing on July 25, 2005, before John J. Wolfe, designated Beneficial Use Special Master for Monroe County. Andrew Tobin represented the Applicant, Geneva Sutton. Tyson Smith represented Monroe County. Geneva Sutton, Sandra Walters of Sandra Walters Consultants, Inc. and Paul Sutton, the son of Geneva Sutton testified for the Applicant. Having reviewed and heard all evidence presented, testimony of witnesses and arguments of counsel, the undersigned Hearing Officer makes the findings of fact and conclusions of law and proposes the determination as set forth below.

ISSUE

Whether the Applicant has been denied all reasonable economic use of her property by application of Policies 203.1.1 and 204.2.1 of the Year 2010 Comprehensive Plan (the "Plan"), and Sections 9.5-347 and 9.5-348 of the Monroe County Code (the "Code"), and whether the Applicant is entitled to relief under Policy 101.18.5 of the Plan and Section 9.5-173 of the Code. Section 9.5-347 requires a 100% open space ratio for wetlands. Section 9.5-348 requires a 50 foot setback from wetlands, which may, in some circumstances, be reduced to 25 feet,

FINDINGS OF FACT

1. The subject property is a portion of Government Lot 1, Section 4, Township 62 East, Key Largo, Monroe County, Florida, which has not been subdivided. The property has, however, been described and treated for years as consisting of two parcels, which have been called "Lot 8" and "Lot 9", and which have been issued separate parcel i.d. numbers by the Monroe County Property Appraiser. The exact size of the property was not introduced or established at the Hearing, but according to the testimony and various documents entered into the record, it appears to be 4-5 acres including the upland and wetland areas. For purposes of this Proposed Determination, and for ease of reference, the property will be described as the "Lots" with references to the individual parcels, "Lot 8" and "Lot 9" as appropriate. The Lots are in the Sparsely Settled (SS) land use district. The Lots are vacant.

2. The Applicant (originally with her husband) purchased Lot 8 and one-half of Lot 9 in 1971 for approximately $27,000 and the other half of Lot 9 in 1984 for approximately $60,000-$64,000. The Applicant purchased the property with the expectation of developing the property with

either a small condominium development or one or more single-family residences.

3. While not conclusively established by evidence presented at the Hearing, the parties agreed that The Lots were zoned GU when purchased. Prior to adoption of the 1986 Comprehensive Plan, a moratorium on "major development" was put into effect around 1983-1984, which prohibited development on the Lots. This effected the Applicant's ability to develop the Lots after she had acquired title to the remaining one-half of Lot 9 in 1984. The Lots were subsequently zoned Native Area (NA), but the Applicant was able to have them rezoned Sparsely Settled (SS) in 1988, which, as stated above, they remain today. The Applicant had applied for Suburban Residential (SR) zoning, but that was denied.

4. There was testimony that the Applicant's husband had some type of approval to build up to 10.3 condominium units in the mid 1970, but that was not acted upon, apparently due to lack of funds to develop the property. After acquiring the other half of Lot 9, in 1984 and after the moratorium on major development had ended, the Applicant attempted a number of times from 1989 trough 1997 to determine what she could build on the Lots. The Applicant introduced various items of correspondence with the County. Two of the items are particularly relevant. The first is an April 25, 1989 letter from Robert Smith, Senior Biologist and Lorenzo Aghemo, Planner, which concludes that with the SS zoning, the Lots are unbuildable (it goes on to say if the Lots were rezoned SR, sufficient development rights could be transferred in to build). In 1996, the Applicant applied for a building permit to construct a single family residence on Lot 8. The application was denied, and the Applicant appealed to the Monroe County Planning Commission. An April 3, 1997 staff report to the Planning Commission prepared by Antonio Gerli and Ralph Gouldy, recommended denial of the appeal. The report referenced and agreed with the 1989 letter from Smith and Aghemo, and concluded that the Lots were unbuildable. As will be discussed below, the report concluded that the buildable area of Lot 8 is only 300 square feet. The report further concludes that even if Lots 8 and 9 are combined, the Lots still are not buildable. Applicant concedes that she has made no further attempts to obtain building approval or relief since 1997.

5. Several constraints exist that make the Lots unbuildable. The salt marsh and buttonwood area on the Lots total 10,783 square feet and the hammock area totals 11,841 square feet. The remainder of the Lots consists of mangrove. As stated above, the open space requirement for the wetland area is 100%. When all applicable setbacks, including the setback from wetlands required by Section 9.5-348 are applied, the buildable area is approximately 300 square feet

6. The Applicant, in an attempt to resolve this matter as consistent as possible with both her goal to construct a single family residence on the Lots and the applicable provisions of the Plan and Code requirements, and to avoid a takings claim, proposed in her Application for the Beneficial Use Hearing and at the Hearing, the construction of one single-family residence on the combined Lots. The proposed house would have a footprint of 2,000 square feet, which is the maximum square footage allowed to qualify for the reduced 25 foot setback from wetlands pursuant to Section 9.5-348(d)(7). This would require a 12.5 foot variance from the 25 foot front yard setback requirement. Side yard setbacks would be met. The house would be located on the least environmentally sensitive portion of the Lots on the upland area of disturbed hammock. The remainder of the Lots would be

placed under a conservation easement. The proposed location of the house was shown on Attachment 6 to the Application. Development rights from both Lots would be applied. It was not clear whether additional development rights would need to be transferred in, but the parties believed that no transfers of development rights are allowed in the SS zoning district (this was not confirmed).

7. Monroe County appeared at the Hearing only through its counsel. No testimony was given and no evidence was presented by the County. The County took the position that the Applicant's right to relief through the beneficial use determination process had expired on statute of limitations grounds. The County moved to dismiss the proceeding based on this argument. Through a post-hearing brief requested by the special master, counsel for the County cited a number of cases to support its position. The County also took the position that, because the Lots were buildable at some point during the ownership of the property beneficial use was not applicable. The County further believed that, in any event, the Applicant had not proven that she had been deprived of all economic value. The County further contended that the Applicant had the burden of showing whether the offending regulations advanced a legitimate governmental interest. In addition, the County took the position that the relief requested by the Applicant, a request for a building permit for a single family residence, was not available to them, because just compensation is the preferred method. Thus, the County did not respond to the merits of the Applicant's proposed relief other than to say it was not available.

CONCLUSIONS OF LAW

8. Policy 101.18.5 of the Plan provides that neither the provisions of the Plan, nor the Land Development Regulations (the "Regulations") shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the Plan. This policy further provides that a property owner may apply for relief from the literal application of applicable Regulations or of the Plan when such application would have the effect of denying all economically reasonable use of that property unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare of its citizens under Florida Law. All reasonable economic use is defined as "the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by current land use case law".

9. Section 9.5-173 of the Code implements the procedure contemplated by Policy 101.18.5 and provides that in order to establish an entitlement to Beneficial Use relief an Applicant must demonstrate that "the Comprehensive Plan and land development regulations" deprive the Applicant of all reasonable economic use of the Lot.

10. As is made clear by Policy 101.18.5, the standards applied to determine whether a regulatory taking has occurred are constitutionally based as set forth in current land use case law. This subject has been addressed by the U.S. Supreme Court in a number of cases, but there are two notable cases applicable to the facts presented here. Both cases involved landowners who claimed that they had been deprived by government regulation of all economically beneficial use of their property.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 798 (1992), the property owner had purchased two ocean front lots to build single family homes. Two years later all development on the lots was prohibited by South Carolina's Beachfront Management Act. The Court confirmed the standard that when government regulations deny all economically beneficial or productive use of land, the property owner is entitled to compensation as a taking. In the Lucas case, clearly all use was prohibited.

In Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed. 2d 592 (2001), the property owner had purchased approximately 20 acres of land for development. Many years later, but prior to development, regulations promulgated by the Rhode Island Coastal Resources Management Council designated salt marshes of the type on the Palazzolo property as protected coastal wetlands and significantly limited development. When his development project was turned down, the property owner sued alleging a taking under the Lucas standard. In that case, a portion of the land was still developable, which was ascertained to have $200,000 of development value. While this was significantly less than the development value of the parcel as a whole, the Supreme Court upheld the Rhode Island Supreme Court's holding that all economically beneficial use was not deprived. Id at 630.

11. While it may well have been prudent for the Applicant to pursue relief on a more timely basis, I conclude that the Applicant is not precluded from seeking relief through the County's beneficial use determination process as a result of the four year statute of limitations cited by the County. Neither the Code nor the Plan establishes a deadline to apply for such relief. Whether the Applicant is barred from pursuing a takings claim in court by the statute would be for a court to decide at that time. I also do not find merit in the argument that because the Lots were buildable at some time during the ownership by Applicant, that relief would not be appropriate. It was only when the Lots became unbuildable that a potential claim ripened. I also conclude that the type of relief requested by the Applicant is not prohibited by the Section 9.5-173. Just compensation is the *preferred option*, but is not required. Indeed, Section 9.5-173(a)(2) sets forth the other types of relief which may be appropriate.

12. Applying the standard to the facts presented herein, it has to be concluded that the inability to construct even one single family residence on the combined Lots under the Plan and Regulations in effect at the time the Applicant filed the subject Beneficial Use Application would deny the Applicant all reasonable economic use of the Lot. There is no disagreement that all development on the Lots is prohibited by the operation of Sections 9.5-347 and 9.5-348, though the County did not respond to the proposal of the Applicant as a potential way to build in conformance with the Plan and the Code. Just compensation being the preferred option under the Code is what I recommend. However, the diminished value of the Lots should be determined as of the time the offending regulations took effect, which was in 1986. There is no basis for a valuation determined as of a date almost 20 years later when the Application was made. The County is not prohibited, however, in any way by Section 9.5-173 from providing relief of the type proposed by the Applicant. I have recommended just compensation, because, there was no evidence or comment by the County on the merits of such relief as an alternative.

PROPOSED DETERMINATION

Based upon the above Findings of Fact and Conclusions of Law, in the absence of any concurrence by the County with the Applicant's proposal or any similar alternative, I recommend to the Board of County Commissioners that a final beneficial use determination be entered awarding just compensation to the Applicant to be determined as of 1986 when the Lots became unbuildable by operation of the Plan and Code.

DONE AND ORDERED this 19th day of July, 2006.

John J. Wolfe, Special Master